Supreme Court, U. S.
FILED
DEC 9 1977
MICHAEL RODAK, JR., CLERK

No. 77-542

In the Supreme Court of the United States

OCTOBER TERM, 1977

JAMES D. FURRATE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In the United States District Court for the Northern District of Texas, petitioner pleaded guilty to four counts of willful failure to file federal income tax returns for 1969 through 1972, in violation of 26 U.S.C. 7203. Upon petitioner's plea of guilty, the government agreed to the dismissal of four counts of income tax evasion (App. 28).[1] The district court sentenced petitioner to six months' imprisonment and three years' probation (App. 13).

Petitioner thereafter engaged new counsel and moved to withdraw his guilty plea on the ground that it was not voluntary. After a full hearing (App. 45-101), the district court found that petitioner's plea had been made

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[1] "App." refers to the appendix filed in the court of appeals.

voluntarily (App. 101). The court of appeals affirmed the judgment of conviction without opinion and denied petitioner's motion for a stay of the mandate pending certiorari (Motion for Bail Bond 2). By order dated November 16, 1977, Mr. Justice Powell denied petitioner's motion for bail pending certiorari.

At the sentencing hearing, the prosecutor read Count I of the indictment to petitioner and summarized the three other counts, all of which charged him with willful failure to file income tax returns. He then advised petitioner of the maximum penalties that could be imposed and of his right to a jury trial. Petitioner stated that he understood the nature of the charges, that he was aware of the maximum penalties that could be imposed, and that he knew he had a right to a jury trial (Pet. App. A2-A4). Upon further questioning by the district court, petitioner stated that he understood the charges and their maximum penalties; that he had had the advice of counsel; that he knew he had a right to a jury trial; that he wished to plead guilty, freely and voluntarily, to the first four counts; that no one had pressured him and that he was pleading guilty because he knew himself to be guilty; and that the United States Attorney had made no promises except that the felony counts would be dismissed in exchange for the pleas to the misdemeanor counts (Pet. App. A4-A5). Petitioner then admitted that he had had income in the amounts stated in the indictment for each of the four years[2] and that he knew he was required by law to file an income tax for each year but had failed to do so (Pet. App. A6-A7).

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[2]Petitioner admitted gross income of $13,039 for 1969, $15,766 for 1970, $16,569 for 1971, and $18,175 in 1972 (Pet. App. A5-A6).

1. Petitioner contends (Pet. 5-7) that the district court failed to comply with Rule 11(c), Fed. R. Crim. P., because it did not ensure that he understood the nature of the charge against him, particularly as it related to willfulness. But the record established beyond question that petitioner admitted that he knew he was required to file tax returns for the years in question and that he failed to do so (Pet. App. A5-A7). Thus, his failures were willful in the sense that he had committed a "voluntary, intentional violation of a known legal duty." *United States* v. *Pomponio*, 429 U.S. 10; *United States* v. *Bishop*, 412 U.S. 346, 360.

McCarthy v. *United States*, 394 U.S. 459, upon which petitioner relies (Pet. 5-6), is distinguishable. There the district judge did not inquire whether the defendant understood the nature of the charge against him. The Court rejected the government's argument that since the defendant had stated his desire to plead guilty, the district court could properly assume that he understood the charge (see 394 U.S. at 464). Here, however, the record establishes that petitioner understood the nature of the charges against him.[3]

3. Finally, petitioner argues (Pet. 7) that his court-appointed attorney, who represented him at the sentencing hearing, was incompetent. A defendant who pleads guilty on the advice of counsel may have his plea vacated only if he can demonstrate that the attorney's advice was not "within the range of competence demanded of attorneys in criminal cases." *Tollett* v. *Henderson*, 411

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[3]The record likewise refutes petitioner's contention (Pet. 6) that the sentencing judge failed to comply with Fed. R. Crim. P., Rule 11(f), which requires that the court make "such inquiry as shall satisfy it that there is a factual basis for the plea."

U.S. 258, 266; *McMann* v. *Richardson*, 397 U.S. 759, 771. Thus, the defendant must prove "serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act." *McMann* v. *Richardson, supra,* 397 U.S. at 774.

There is no such proof here. Petitioner suggests (Pet. 7) that he might have gone to trial and testified that he had not known he could file the returns without paying the tax. But such testimony would not even constitute a denial of the existence of willfulness; it would not establish any colorable defense. There was, therefore, no reason why petitioner's counsel should have advised such a course of action. Accordingly, petitioner has not established even that his counsel was guilty of an error of judgment, let alone that the quality of the representation he received fell below the constitutional minimum.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

DOJ-1977-12